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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 233

JOHN BURNS and LAWRENCE NOLAN,
Petitioners

versus

CAROLINA POWER & LIGHT COMPANY,
Respondent

BRIEF AND APPENDIX OF RESPONDENT

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SUMMARY STATEMENT OF MATTER INVOLVED

We wish to call attention to omissions and inaccuracies of the petitioners' statement in the particulars following:

(1) The complaint alleged that the plaintiff and Daley were fellow employees of the operator of the brick yard; that they were working under and subject to the provisions of the South Carolina Workmen's Compensation Act, Section 7035-1 et seq. of the 1942 Code of Laws for the State of South Carolina and amendments thereto, and that the compensation due thereunder for the injuries complained of had been paid (see par. 9 complaint R. p. 3). The section of the statute in question, to wit: 7035-10 of said Code held to preclude suit by plaintiff against Daley, as a fellow employee, is a part of said Compensation Act, and reads as follows:

> Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified.

That the respondent in its Petition for Removal, among other grounds, pleaded the immunity of Daley from suit under the provisions of said statute as a ground of removal in the following language: "And as between plaintiff and defendant Daley the provisions of the Workmen's Compensation Act are exclusive" (see Sec. 4(C) of pet. R. p. 9). The trial judge in his opinion and order denying motion to remand held that acts were not alleged by plaintiff showing "the violation of any duty owed by Daley to him. * * * And so I find that since the complaint does not set out a good cause of action against Daley, and certainly not one that is joint and concurrent with the acts alleged to have been committed by the power company." (Opinion of Judge Waring R. p. 14). The trial judge wrote his opinion and respondent knew nothing about it until after it was filed. Apparently for reasons of his own the judge made no mention of Daley's immunity under the statute.

(2) Petitioners mentioned to the Court of Appeals in their petition to rehear a decision of the lower court of South Carolina. The petition to rehear speaks for itself on this subject and is set out verbatim at pages 17 and 18 of this brief. A reference to it will show that said decision was not cited or furnished to the court, nor was the court advised of the name of the judge who decided it or where it could be found.

ARGUMENT

NO GROUNDS FOR CERTIORARI ARE STATED IN THE PETITION

We take it to be unnecessary to cite authority to the effect that this court grants certiorari sparingly, and when it does grant it, it is only when special or important reasons are shown (Supreme Court Rule 38-5).

"Question One" is obviously without merit. There is nothing in the petition, or in the brief, to show that there is any diversity of federal opinion on that question. There is no showing that a question of important local law has been decided in a way probably in conflict with local decisions. There is no confusion to be cleared up. There is no question of public policy shown. Nor is it shown that the decision involves important questions of federal law which have not been or should be settled. Nor is there anything else shown which comes within the purport of Rule 38-5.

If there is one good ground stated in a petition for removal the failure of the trial judge to base his denial of motion to remand on it and choosing an invalid ground could by no stretch of logic or reason prevent a court of review from recognizing and giving effect to such valid ground.

It is true that the petitioners undertake to give vitality to that question by stating that the ground upon which the Court of Appeals sustained the removal after rejecting the ground assigned by the trial judge, "involved the interpretation of the state statute involving public policy of the state not theretofore decided by any state court." But they do not show any conflict with any local decision, except the purported decision of the Court of Common Pleas, however, as we shall later show, a decision of the Court of Common Pleas is not binding on the federal courts.

They cite cases at page 6 of the petition which they contend sustain their claim that public policy is involved in the interpretation of a state statute, and that, therefore, the federal court was without authority to interpret it. But those cases are not authority for their position. On the other hand they are authority for respondent's position that no recognized question of public policy is involved, and that a federal court can and will interpret state statutes, when not interpreted by the state court (in all but a few exceptions, none of which are present in this case,) whenever it is necessary to enable it to render a judgment in a case before it.

Take the case of *Meredith v. City of Winterhaven*, 320 U. S. 228, 88 L. Ed. 9 cited by petitioner at page 6 of their brief. There the Supreme Court reversed the Court of Appeals which had held that the federal courts should decline jurisdiction and that the parties should proceed in the state courts since it involved the interpretation of statutes of the State of Florida in respect to refunding municipal bonds, and that the decisions of the Florida Court had left the matter in a state of uncertainty. The Supreme Court pointed out that "it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary for the rendition of a judgment," unless there be some special circumstances involving recognized principles of public policy. The court adds:

> When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state would thwart the purpose of the jurisdictional act. The exceptions relate to the discretionary powers of courts of equity. An appeal to the equity jurisdiction conferred on federal district courts

is an appeal to the sound discretion which guides the determination of courts of equity.

Then the court goes on at length to enumerate these exceptional circumstances. But none of them are present in our case, as there were none present in the Meredith case. Ours is not a case in equity calling for the exercise of discretionary powers, hence it does not come within the exceptions mentioned. The other case cited by petitioners, namely, *Green v. Phillips Petroleum Company*, 119 F. (2) 466, *Cert. denied* 314 U. S. 637, 86 L. Ed. 511 (see p. 6 of pet.) cited by petitioners comes clearly within the above exceptions, as it was an equity action in the Federal Court designed to interfere with the fiscal policy of the state by restraining the collection of taxes arising under an uninterpreted tax statute of Iowa.

In the Meredith case, supra, the Supreme Court further says:

> Congress having adopted the policy of opening the Federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. * * * Erie R. Co. v. Thompkins (citation omitted) did not free a federal court from the duty of deciding questions of state law in diversity cases.

In referring to a list of cited cases wherein the Supreme Court decided difficult questions of unsettled state law the court in the Meredith case said further:

> Even though our decisions could not finally settle the questions of state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand,

and in accordance with the applicable principles for determining state law.

Instead of there being confusion, there is uniformity of decision on the interpretation of the statute in question, (except for the lone decision of the court of common pleas which petitioners unsuccessfully attempted to inject into this matter). The opinion of the Court of Appeals indicates, and our research confirms, that no courts other than Virginia and North Carolina have interpreted statutes of identical wording or purport with that of the South Carolina statute. Therefore, there is no diversity of opinion on the effect of the statute to exclude plaintiffs' action against Daley. The North Carolina Court reaffirmed its interpretation in an opinion filed subsequent to the opinion of the Court of Appeals in this case. See *Warner v. Leder*, 234 N. C. 727, 69 S. E. (2) 6. In that case the North Carolina court says:

> However, with the exception of the decisions in Tscheiller v. Weaving Co. 214 N. C. 449, 199 S. E. 623 and McCune v. Manufacturing Co. 217 N. C. 351, 8 S. E. (2) 219, we find no decision in this or any other jurisdiction where, under an immunity clause similar to that contained in G. S. 97-9, it has been held that an injured employee may maintain an action at common law against a fellow employee who was responsible for his injury.

In Warner's case the court made it clear that they modified the Tscheiller and McCune cases in so far as they might be in conflict with the decision in Warner's case. G. S. 97-9 is the North Carolina statute of identical language with the South Carolina statute in question.

Therefore, "Question One" presents no ground to justify the grant of certiorari.

"Question Two" does not present any ground for certiorari. Its purpose seems to be to present as error the failure of the Court of Appeals for refusing to grant the petitioners' Petition to Rehear upon the ground that they called to its attention the decision of the Court of Common Pleas of South Carolina.

There is no conflict of decision in the federal courts shown on this point. There is no conflict with applicable local decisions shown, for the very good reason that the decision which they suggest as holding differently on this statute is not an applicable decision because it is not a precedent binding upon any other court, state, or federal (See *King v. United Commercial Travelers*, 333 U. S. 153, 92 L. Ed. 608, and certificate of Chief Justice of South Carolina, Respondent's appx. p. 1). There is no conflict shown with decisions of this court. It is not shown to be a departure from the accepted and usual course of judicial proceedings. Nor is any other ground shown within the purport of Rule 38-5.

And, above all else the lower court decision mentioned was not brought to the attention of the Court of Appeals or to this court sufficiently to enable either to give it intelligent consideration. It is merely mentioned, but since it is an unpublished decision in an unnamed case and can only be found by searching through the indexes of the judgment rolls of the unnamed county in which it was rendered, neither the Court of Appeals was, nor this court is, in a position to consider it. This question did not present anything to the Court of Appeals and does not present anything to this court. It is not based on anything noticed or noticeable by either court.

Furthermore, there is no suggestion in the petition that the case was not tried and adjudicated below in accordance with state law. Therefore, having been tried and adjudicated according to state law, apparently what the petitioners

hope for by this petition is to get a second "bite at the cherry" against this respondent in the state court even though no error has been committed as to the trial on the merits. That is no special or important reason for granting certiorari. Petitioners say that their right to recover for serious injury will be forever lost unless by this means they can get back into the state court. How, may we ask, can it be said that they have lost or will lose a right to recover when there is no contention that the directed verdict was contrary to state law?

It is said in *King v. United Commercial Travelers*, supra, "as we have but recently had occasion to remark, a federal court adjudicating a matter of state law in a diversity suit is, '*in effect* only another court of the state.' " (Italics supplied.) Citing at footnote 21, *Guaranty Trust Company v. York*, 326 U. S. 99, 89 L. Ed. 2079, 160 A. L. R. 1231.

Southern Power Company v. North Carolina Public Service Company, et al, 33 Sup. Ct. Rep. 164, 263 U. S. 508, 68 L. Ed. 413, says:

> Heretofore we have pointed out the necessity for clear, definite, and complete disclosures concerning the controversy when applying for certiorari. Furness W. & Co. v. Yanz-Tsze Ins. Assoc. 242 U. S. 430, 61 L. Ed. 409, 31 Sup. Ct. Rep. 141; Layne & B. Corp. v. Western Well Works, 261 U. S. 387, 67 L. Ed. 712, 43 Sup. Ct. Rep. 422 * * * Unless the requirements specified in Furness W. & Co. v. Yanz-Tsze Ins. Assoc. are observed, we cannot hope properly to dispose of an increasing docket.

In case the court feels that it ought to consider the questions submitted by the petition beyond what we have pointed out above as being fatal to the petition, we have included a more detailed discussion which follows immediately hereunder.

I. FURTHER DISCUSSION OF QUESTION ONE OF PETITION (Pet. p. 5)

This question is based upon a false premise. The Court of Appeals did not hold that the complaint stated a cause of action which could be maintained against the resident defendant Daley. It held that so far as the allegation of negligence against Daley were concerned they were adequate, but that the plaintiffs were, nevertheless, precluded by the Compensation Act from maintaining an action thereon against Daley, a fellow employee. When one examines the opinion it will be found that in the course of reaching its conclusion the Court of Appeals stated that the lower court erroneously ruled that the complaint did not state facts sufficient to constitute an ordinary cause of action for negligence at common law against Daley, pointing out that the language of the complaint was sufficient to constitute a cause of action for negligence, but that the plaintiff was, however, precluded from prosecuting such action against Daley because the plaintiff "having claimed and received compensation under the South Carolina Workmen's Compensation Act from his employer, has no cause of action against Daley" due to the provisions of Section 7035-10, Code Laws of South Carolina, 1942. It is the interpretation given to this statute by the Court of Appeals which constitutes the sole basis of the petition for the writ of certiorari. And, as pointed out earlier, that is not such a question as merits a review by this court.

Court opinions are not to be construed by isolating from the main body of the opinion a sentence, or a clause, or a statement of grounds, used in the process of explaining the basis for reaching the main conclusion. It is inconceivable that any fair and logical mind would conclude that merely because the Court of Appeals stated that the district judge was in error in ruling that the complaint failed to state facts

sufficient to constitute actionable negligence against Daley, or that they were separable acts, that such nullified the other valid grounds of removal contained in the petition.

In the petition for removal, in addition to the grounds that the complaint does not allege negligence against Daley, separability, etc., it is stated "*and as between the plaintiff and defendant Daley the provisions of the Workmen's Compensation Act are exclusive.*" (R. p. 9, par. 4 (C)).

The Court of Appeals necessarily found that the petition contained, as an additional ground for improper joinder, the exclusive provisions of the Compensation Act else it would not have held the case was removable on that ground. The petitioners in their petition for certiorari do not contend that this ground was not alleged in the Petition for Removal. All they question here is the right of the Court of Appeals to sustain the removal on that ground after having held that the district court chose the wrong ground.

It is the validity of the grounds, or any one of them, stated in the Petition for Removal at the time it is filed which works the removal, not the reasons assigned by the judge in refusing a motion to remand. The judge by selecting a faulty ground out of several alleged in the petition as the basis for refusal to remand does not in the slightest destroy or impair the respondent's right of removability upon any other valid ground stated in the petition. And any court of review, upon reviewing the refusal to remand, has not only the power but it is its duty to examine the entire petition for valid grounds, and if it finds one good one out of many bad grounds, even though the judge below chose a bad one and omitted the good one, it must sustain the removal. This is a proposition so simple as to require no authority. In fact, it is so simple that we have been unable to find that it has ever before been presented to a court of

review, and hence no authority is available. We can only cite logic and reason as our authority.

It has always been the rule that removability is a matter of law arising upon the allegations of the complaint and the grounds stated in the Petition for Removal. The filing of the petition in apt time containing legal grounds for removal irrevocably fixes the legal status of the right of removal. The court cannot allow an amendment to either the complaint or the petition for the purpose of altering the legal status thus fixed upon filing the petition.

Pullman Company v. Jenkins, 305 U. S. 534, 83 L. Ed. 334 (1938)

St. Paul Mercury Indemnity Company v. Red Cab Company, 303 U. S. 283, 82 L. Ed. 845 (1937)

Salem Trust Co. v. Manufacturers' Finance Company, 264 U. S. 182, 68 L. Ed. 628.

Furthermore, we do not concede that Judge Waring was wrong. On the other hand we assert that he was right and that the Court of Appeals was wrong in declaring him to be in error.

It is fundamental that the sufficiency of the allegations of negligence against Daley is to be determined by the South Carolina law, and not by any federal rules of pleading. *Chicago R. I. & P. R. Co. v. Schwyghart*, 227 U. S. 184, 57 L. Ed. 180. The cases cited by the Court of Appeals (R. 30) do not alter that rule, and if they attempted to do so they would be contrary to *Erie R. Co. v. Thompkins*. There is a vast difference between a complaint which is demurrable for failure to state a cause of action and one which states a cause of action but is subject to a motion to make it more definite. In the first instance no cause of action is alleged, in the latter a cause of action is alleged but the defendant

is entitled to a more specific statement of the facts relied on as constituting the cause of action.

What the cases cited by the Court of Appeals on this point hold is: "A merely defective statement of plaintiff's action does not warrant removal." *Albi v. Street & Smith Publications*, 140 F. (2) 310 (312) and "if the issue, be it one of law or of fact, is doubtful it must be tried in the court having jurisdiction and not determined in removal proceedings." *Locke v. St. Louis-San Francisco Railway Company*, 87 F. (2) 418 (420). They do not apply to the case in hand.

Code of Laws of South Carolina 1942, Sec. 456 (6) provides: "The defendant may demur to the complaint when it shall appear upon the face thereof: * * * (6) That the complaint does not state facts sufficient to constitute a cause of action."

This means what it says, namely, that a complaint in order to state a cause of action must state facts which, if true, gives the plaintiff a legal right to recover. Of course, under Federal Rules of Civil Procedure it is sufficient to allege only the pleader's conclusion that the plaintiff was injured by the negligence of the defendant and then let the defendant resort to the rules of discovery for ascertaining the facts relied on as constituting the actionable negligence. But not so in South Carolina State Courts. It requires the facts to be alleged in the complaint.

In the case of *Kentucky Refining Company v. Saluda Oil Mill Company*, 70 S. C. 89, 48 S. E. 987, the court had before it on demurrer the allegations of a counterclaim set up by the defendant against the plaintiff for damages alleged to have resulted from a breach of contract without setting out the terms of the contract. The court said:

> "When an answer sets up a counterclaim, the defendant makes himself, in respect to such demand, a plain-

tiff in fact, though not in name, and the sufficiency of the facts to constitute the counterclaim is to be determined in the same manner as when a demurrer is interposed to a complaint on the ground that it does not state facts sufficient to constitute a cause of action.

Then the court goes on to say:

In an action for damages arising ex contractu it is essential that the contract be stated correctly, and with certainty. 4 Enc. Pl. & Pr. 918, and note 6; 9 Cyc. 713. If the defect in a pleading relates merely to the form, the appropriate remedy is by motion to make definite and certain; but, if it is substantial, then it is subject to demurrer. In Pom. Code Rem. Sec. 549, it is said: "The true doctrine to be gathered from all the cases is that, if the substantial facts which constitute a cause of action are stated in a complaint, or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective, such sufficiency pertaining, however, to the form, rather than the substance, the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment." The court must not be left to surmise, but "must be able to gather from the legal import of the facts which are alleged—although improperly alleged—the nature of the defense relied on; in other words, the substantial facts which constitute that defense must in some manner appear upon the record." Pom. Code Rem. Sec. 600. The defendant did not attempt to set forth the terms of the contract, and there was an entire failure of these substantial and necessary allegations. Furthermore, it denied that the terms of the contract were correctly

> alleged in the complaint. Testing the counterclaims by these principles, it is apparent that the defects were substantial, rather than formal, and that a demurrer was the proper remedy for correcting them.

Applying that rule of pleading there seems to be no doubt but that the complaint could not have survived a demurrer by Daley in this state court. Hence Judge Waring was right in holding the allegations to be insufficient to state a cause of action against Daley.

On this point we think the Court of Appeals lapsed into error in failing to take note of the fact that in paragraph 7 of the complaint (R. p. 2) general facts are alleged which establish the activities of Daley and of the plaintiffs setting the stage of the injury. It sets out the reason for moving the crane from its location out of reach of the line; it places the plaintiffs on the ground to handle the steel cables in the process of replacing a block on a "monkey line"; it places Daley in the cab to operate the crane and says of his situation and acts there: "*that the operator of said crane could not see said high voltage power lines from his position in the cab* * * * and after said crane had been moved back with said boom in its lowered position while plaintiff was standing on the ground holding the 'monkey line', the boom was raised by the defendant, J. M. Daley, until the cables attached to said boom came in contact with the power lines," etc.

There is no allegation in the complaint from which it could be inferred that Daley knew, or should have known, the power line was there. There is no allegation that Daley had ever worked there before so as to fix him with knowledge of the existence of the line. There was no allegation that anyone had advised him of the presence of the power line. There was no allegation that Daley had any supervisory duties which imposed upon him a duty to see that the plaintiffs had a safe place to work.

So the complaint is completely barren of any allegation of fact which if true fixed Daley with knowledge of this line or imposed upon him a duty to ascertain its presence. Now, if it did not then under the rules of pleading in South Carolina a cause of action was not alleged as to Daley.

Sub-paragraphs 10 (e) (erroneously enumerated (a) in the Court of Appeals opinion), (f), (k), and (l) of the complaint which the Court of Appeals said alleged negligence against Daley must be read and construed in the light of the basic overall allegation that Daley could not see the line and the failure to allege facts from which actual or constructive knowledge of its presence could be legitimately inferred.

Was it negligence for Daley to do or fail to do any one of the acts enumerated in these sub-paragraphs, if he could not see the line, as alleged in paragraph 7, and if there is no allegation in the complaint to fix him with actual or constructive notice of the existence of the line, or to otherwise impose upon him any duty to dismount from his cab and look? The district judge said No.

The streamlining of pleadings under the present Federal Rules of Civil Procedure may well be calculated to have caused the Court of Appeals to minimize the necessity for alleging all facts necessary to constitute the elements of actionable negligence. Whereas, Judge Waring was a seasoned South Carolina lawyer and from long years of state court practice before appointment to the bench was well versed in the requirements for stating a cause of action under the law of that state.

The statement of Judge Waring as to Daley's negligence quoted in the opinion of the Court of Appeals, (R. p. 30) was made in the light of and in reference to the evidence at the trial and not in respect to the allegations of the complaint. On the trial Daley testified for plaintiff that he had

worked at this brick plant 11 years; that he was the foreman of these plaintiffs. (Transcript of Testimony, stenog. pp. 148, 150, Vol. II, p. 431 Transc. on Appeal). Daley, both plaintiffs, and Seigler, the Plant Manager, all testified Daley was foreman of plaintiffs. (See stenog. trans. of ev., pp. 90-91, 150, 460, 498). Consequently, he knew or should have known the line was there. Such being true the evidence showed that he owed a duty to these men to look out for the line. But removal rests solely on the allegations of the complaint and petition, and no such facts were alleged therein.

We definitely think Judge Waring was right in refusing to remand on the grounds which the Court of Appeals held to be erroneous. But if he was wrong the fact that he thought he was right and his refusal to remand on that ground, without passing on other grounds stated in the petition for removal, does not alter one whit the right of removal upon the ground that the Compensation Act immunized Daley from this suit.

II. FURTHER DISCUSSION OF QUESTION TWO OF PETITION (Pet. p. 7)

This is not a proper question for consideration of this court because there is nothing in the record which adequately raises the question or which would support it if it were raised.

> Petitions of this character are at the risk of the party making them, and whenever, in the progress of the cause, facts develop which, if disclosed on the application, would have induced a refusal, the court may, upon motion by a party, or ex mero motu, dismiss the writ. *Furness, Withy & Co. v. Yanz-Tsze Ins. Co.* 242 U. S.

430, 61 L. Ed. 409, 31 Sup. Ct. Rep. 141. See also *Southern Power Co. v. North Carolina Public Service Company, supra.*

The petitioners' Petition to Rehear filed with the Court of Appeals likewise presented nothing to that court to enable it to have intelligently passed upon the alleged decision of a judge of the Court of Common Pleas. The statement contained in said Petition to Rehear on this subject is as follows:

> Furthermore, and most important, your petitioners state for the information of this Honorable Court that a South Carolina Court of Record has, since the Opinion of this Court in this case was filed on the 29th day of December, 1951, handed down a decision holding that the phrase "or those conducting his business" as contained in Section 7035-10 of the South Carolina Workmen's Compensation Act does not preclude a common law action by an employee against a fellow employee for the latter's negligence. This decision was handed down by a Circuit Court of Common Pleas in the Fourth Judicial Circuit of South Carolina. The decision will be appealed to the Supreme Court of South Carolina, at least, your petitioners so understand.
>
> This Court, then, has decided this case contra to South Carolina law. It is true at the time this Court handed down its decision, a South Carolina Court had not passed on the question, but since that time and before the time for applying for a re-hearing has transpired, a South Carolina Court has decided the question, and has decided it contra to the holding of this Court; therefore, your petitioners ask this Honorable Court to grant them a re-hearing so this Court may re-consider its decision as to what the South Carolina

law is. If this Court does not grant your petitioners a re-hearing, it will have deprived your petitioners of a right to recover for their injuries, while others who might receive injuries under like circumstances will be allowed to recover for their injuries under the correct application of South Carolina law. Remember that the highest Court in South Carolina, passing on the question, has decided that South Carolina law does not preclude your petitioners from bringing a common law action against their fellow employee. This is the law of South Carolina until the South Carolina Supreme Court reverses such a holding or passes upon the question."

(See pp. 4 and 5 of Petition to Rehear, found at p. 16 of Transcript Record of Proceedings in Court of Appeals).

The petitioners would have done better than that if they had actually wanted the state court opinion scrutinized and analyzed by the Court of Appeals. They could have produced a copy of the record and opinion in that case but they did not, and did not even give the court the name of the case, or the identity of the judge who is claimed to have interpreted the statute, or the place where the opinion could be found. That court was asked to reverse its ruling as to the effect of the statute upon a meager statement of counsel without submitting anything in support or verification of their statement. So of course the Court of Appeals did not reverse its carefully considered and documented decision on that point, nor did it go on a reconnoitering expedition through the records of the courts of Common Pleas of 46 counties of South Carolina, and it seems to us to be idle to think that it would have done so, or to now contend that it should have done so. But even if petitioner had sent up a transcript of the record and the decision in the state case to which they refer, the Court of Appeals would not have

been bound by it, for the reasons stated in *King v. Order of United Commercial Travelers*, supra.

It seems that the petitioners expected the Court of Appeals to act upon a mere hint or suggestion rather than upon actuality.

And the petitioners do no better when they come to petition this court for certiorari upon "Question Two." They still fail to submit to this court the record, or the opinion of the alleged state case, or to advise the court of the identity of the judge who decided it or to give the title of the case or the locality of the court in which it was decided, nor do they file or send up a transcript of the record of that case, which could easily have been done because they say it is pending on appeal in the Supreme Court of South Carolina, so that this court may look into it and see, as is its right and duty to do, whether the Supreme Court of South Carolina will be likely to entertain such appeal and, if so, what it will probably hold in respect to this questioned statute.

It seems quite strange for petitioners to have asked the Court of Appeals to reverse itself, and to now ask this court to grant the writ of certiorari to review and reverse the Court of Appeals, on this point upon a mere unsupported statement out of the mouths of petitioners, when it would have been so easy and appropriate to have submitted the opinion, record, and the briefs on file in the Supreme Court of South Carolina.

It is not up to respondent to bring up the record in the state case in support of the petition. We know of no way by which it can be brought here except by the petitioners, acting either voluntarily or by direction of the court. Since certiorari involves a matter of discretion, it does not seem to respondent that such discretion can or should be exercised favorably to petitioners on such hearsay and elusion as to what the Court of Common Pleas held and what the state

Supreme Court will probably hold. Since we are dealing with the question injected into this case by petitioners by reference to matters wholly outside of the record, we hope it is not improper for us to say that respondent voluntarily offered to agree that petitioners might bring up the record of the state case on appeal to the Supreme Court of South Carolina. The petitioners declined. Therefore, this question should not be considered.

If, however, the court decides to consider "Question Two" as a ground for certiorari, the respondent requests that the petitioners be directed to bring up a transcript of the entire record and briefs filed in said state case on file in the pending appeal in the Supreme Court of South Carolina, including the petition, and brief of Messrs. Willcox, Hardee, Houck & Palmer, Attorneys, Florence, S. C., appearing *amici curiae*. This respondent is not the *amicus curiae*, as erroneously stated by petitioners, however, it is readily admitted that the *amici curiae* were associated in the trial below as counsel for respondent.

If the court decides to require the record in the state case brought up, petitioner hereby requests permission to file a supplemental brief in consequence of that record being brought into consideration.

If the court concludes to consider "Question Two" but decides not to require that the record in the state case be brought up, we are still of the opinion that the decision in said state case is not binding on this court because of the opinion of this court in *King v. United Commercial Travelers*, supra, cited and followed by the 3rd Circuit in *Sunbeam Corp. v. Civil Service Employees' Coop. Ass'n.* 187 F(2) 768.

That case came up from South Carolina and presented to this court the identical legal question involved in "Question Two"—namely, whether a federal court, under the

Rules of Decisions Act, Tit. 28, U. S. C. A. sec. 725 (now 1652) and *Erie R. Co. v. Thompkins*, 304 U. S. 64, 82 L. Ed. 1188, and subsequent cases is bound to follow the decisions of the Court of Common Pleas of South Carolina as declaring the state law on the legal question involved? If it is not, then of course the Court of Appeals would have acted properly in declining to follow the alleged decision of the Court of Common Pleas, had it been properly before it.

In King's case Mr. Chief Justice Vinson says:

> * * * and the question it raises (the King case) is whether, in the long run, it would promote uniformity in the application of South Carolina law if the Federal courts confronted with questions under that law were obliged to follow the ruling of a Court of Common Pleas. * * * Respondent has submitted a certificate from the Chief Justice of the Supreme Court of South Carolina to the effect that "under the practice in this state an unappealed decision of the Court of Common Pleas is binding only upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina. * * * (par. add.)

Consideration of these facts leads us to the conclusion that the Circuit Court of Appeals did not commit error. While that court properly attributed some weight to the Spartanburg Common Pleas decision, we believe that it was justified in holding the decision not controlling and in proceeding to make its own determination of what the Supreme Court of South Carolina would probably rule in a similar case.

In the first place, a Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its de-

cisions should be taken as authoritative expositions of that State's "law". In future cases between different parties, as indicated above, a Common Pleas decision does not exact conformity from either the same court or lesser courts within its territorial jurisdiction; and it may apparently be ignored by other Courts of Common Pleas without the compunctions which courts often experience in reaching results divergent from those reached by another court of coordinate jurisdiction. Thus a Common Pleas decision does not, so far as we have been informed, of itself evidence one of the "rules of decision commonly accepted and acted upon by the bar and inferior courts." Furthermore, as we have but recently had occasion to remark, a federal court adjudicating a matter of state law in a diversity suit is "in effect, only another court of the State"; it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.

Secondly, the difficulty of locating Common Pleas decisions is a matter of great practical significance. Litigants could find all the decisions on any given subject only by laboriously searching the judgment rolls in all of South Carolina's forty-six counties. To hold that federal courts must abide by Common Pleas decisions might well put a premium on the financial ability required for exhaustive screening of the judgment rolls or for the maintenance of private records. In cases where the parties could not afford such practices, the result would often be to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered.

Respondent has filed in this cause a certificate of the Chief Justice of the South Carolina Supreme Court, as was

done in the King case, in reference to the effect of the decisions of Courts of Common Pleas as judicial precedents upon other courts in South Carolina. (See Respondent's Appx. p. 1).

It, therefore, seems that King's case is decisive and the petition should be denied.

Respectfully submitted,

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